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No. 06-1037

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In The

Supreme Court of the United States

Kentucky Retirement Systems,
Commonwealth of Kentucky, and
Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

The Commonwealth of Kentucky has established a statutory retirement plan for public servants. Employees are eligible to retire either (1) after serving 20 years; or (2) after reaching age 55 with five years of employment, whichever milestone comes first. If an employee is disabled before reaching either milestone, the plan accelerates the employee to the nearest retirement milestone by imputing additional years of service, and calculates retirement benefits based upon those imputed years. Any distinction between categories of disabled employees is not based on age per se, but is based upon whether they are eligible to retire, which could (but does not necessarily) depend on age.

The question presented is whether the relevance of age as a potential factor in the distribution of retirement benefits to disabled workers establishes a prima facie case of arbitrary discrimination, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*?

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JURISDICTION

The Court of Appeals sitting en banc entered an order and opinion on October 31, 2006, finding various provisions of the Kentucky retirement statute facially discriminatory in violation of the ADEA. Petitioners filed a petition for writ of certiorari on January 23, 2007, which this Court granted on September 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves interpretation of 29 U.S.C. §§ 621 and 623, which are reproduced in the Statutory Appendix at 1a-2a. The salient terms of the retirement plan at issue in this case are set out in Kentucky Revised Statutes §§ 16.505(15), 16.576, 16.582, 61.592, and 78.545 (1998), as well as KRS

§ 16.577 (2000) and KRS § 16.577(2) (2001), which are reproduced in relevant part in the Statutory Appendix beginning at 2a. All references to Kentucky Revised Statutes will be to the 1998 edition unless otherwise indicated, and will be cited as "KRS § ____."

INTRODUCTION

The Court of Appeals has presented this Court with a paradox. Everyone agrees that it is permissible—indeed, common—for an employer to offer employees disability benefits that terminate the moment the employee becomes eligible to retire. Everyone agrees that it is permissible for an employer to offer a retirement plan that fixes eligibility based on age. The practice is so ubiquitous that it is scarcely a stretch to say that "all retirement plans necessarily make distinctions based on age." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 207 (1977) (White, J., concurring). Yet, the Court of Appeals has held that it is illegal to combine the two features in one plan.

Kentucky, like virtually every public employer in the nation, has a defined-benefit retirement plan designed to attract and retain qualified employees. Employees can qualify for "normal retirement" by either (1) completing 20 years of service or (2) reaching age 55 with five years of service. There is no mandatory retirement age. If an employee is disabled before reaching either milestone, Kentucky gives him a safety net called "disability retirement."

In structuring its benefits, Kentucky made a decision not to provide *disability* retirement benefits to an employee who is already eligible for

normal retirement by virtue of having reached either milestone. It decided not to give a safety net to an employee who does not need one. Insurance companies make the same decision when they sell term disability policies. Congress made the same judgment when it designed its gigantic Social Security Disability program. But when Kentucky made that judgment, the EEOC accused it of age discrimination.

The EEOC is wrong. The disability retirement statute does not differentiate among employees based on *age*; it differentiates among them based on *eligibility for normal retirement*. Anyone who is eligible for normal retirement—on either prescribed basis—cannot recover disability benefits, regardless of age. The undisputed evidence was that Kentucky's retirement statute was neither arbitrary nor infected by inaccurate ageist stereotypes. The language of the ADEA and the decisions interpreting it confirm that Kentucky's retirement statute, which is designed in crucial ways to attract older works, is legal. The Court of Appeals should be reversed.

STATEMENT OF THE CASE

Kentucky's Retirement Statute

The Commonwealth of Kentucky maintains a defined-benefit retirement system covering hundreds of thousands of state, county, and municipal employees. All the material terms of the benefits are defined by statute. The plan is funded from a single trust. KRS § 78.520. The trust consists of contributions from both employers and employees, along with earnings on investments. *Id.* §§ 78.615, 78.650.

Under the Kentucky retirement statute, a crucial moment for any employee is the point at which the employee becomes eligible for "unreduced retirement benefits." *See* J.A. 21-22. That is when the employee is assured that he has a guaranteed income stream for the rest of his life, regardless of what unexpected turns it may take. Kentucky law prescribes that, under normal circumstances, a public employee is eligible to retire with unreduced benefits upon crossing either of two thresholds, whichever comes earlier.[1] J.A. 21-22. One route to "normal" retirement allows an employee to retire after completing 20 years of credited service. KRS §§ 16.505(15), 17.576(1). Thus, for example, an employee who begins working for the government at age 20, is eligible to retire after 20 years of service, at age 40. For obvious reasons, this route to normal retirement is called "service retirement."

The other route to normal retirement is when an employee reaches age 55 and has at least five years of service under his belt. *Id.* §§ 16.505(15), 16.576(1).[2] So, for example, an employee who

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[1] The EEOC has pursued this challenge in connection with a claim by a "hazardous duty member," a class that includes firefighters, police officers, corrections officers, and others whose jobs are especially dangerous. KRS § 61.592; *see id.* § 78.545(40). Consequently, the parties and courts have confined their discussion to the provisions governing this class. All agree that the comparable statutes that apply to other members have essentially the same structure, albeit with different numerical thresholds for age and years of service. *See, e.g.*, J.A. 38-39, 60 n.1, 62.

[2] Although not part of the benefits structure at issue in this case, Kentucky provides an additional benefit only to

(footnote continued...)

begins working at age 40 is eligible to retire at age 55, having served only 15 years. Likewise, an employee who begins a public sector job at age 50 is eligible to retire upon reaching 55, after only five years of service. This second option is of enormous benefit to older employees like the hypothetical 50-year-old just mentioned, for he might never get a penny of retirement benefits if eligibility were conditioned only on his ability to labor 20 years in a hazardous job.

There is no rule that an employee must retire upon reaching either milestone of normal retirement—either the 20-year threshold of service retirement or the alternative threshold of age 55 with five years of service. The employee simply has the option of retiring at that point, or any point thereafter, with full benefits.

(continued from previous page)
employees 55 or older: After only one month of service, an employee who has served less than five years and becomes disabled will get a so-called "money purchase plan." KRS § 16.576(6). This benefit is not available to any employee who is under 55.

The terminology has been in flux over the years. At the time relevant to this case, the statutory provisions used the term "normal retirement" to encompass both routes to retirement described in the text—whether the employee satisfied the service threshold or the threshold of age 55 plus five years of service. *Id.* § 16.505(15). This brief adopts this convention, although we acknowledge that (because of subsequent changes in the statute) the parties at times use the phrase "normal retirement," as distinguished from "service retirement," to cover *only* the situation where an employee is eligible to retire at age 55 with five years of service. *See* J.A. 21-22 & n.3.

When an employee who is eligible for normal retirement avails himself of that benefit, he collects retirement payments that are fixed by formula. Like all defined-benefit retirement plans, the precise amount of benefit is a function of both the employee's compensation averaged over a period of years (called "final compensation") and the length of his service. *Id.* § 16.576(3). Specifically, the formula calculates benefits by taking a fixed percentage of the employee's final compensation (2.5%) and multiplying it by the number of years the employee has served. *Id.* By way of example, an employee who worked 30 years and retired with final compensation of $60,000 a year would have a healthy annual pension of $45,000 ($60,000 × 30 × 2.5%). *Id.*

Kentucky's Retirement Safety Net for Disabled Workers

Sadly, some employees cannot make it to either retirement milestone because they become disabled before attaining eligibility for normal retirement. Under many private retirement plans, the employee would be out of luck, and would get no retirement benefits. Some private employers offer the employee a separate disability plan, which typically covers the employee until the point of eligibility for retirement.

Kentucky thought it was critical to provide a safety net to disabled employees who find themselves in this unfortunate position. But Kentucky does not achieve this end by providing a separate disability policy. Rather, the underlying premise of Kentucky's approach is "a policy determination that [all] the members of the plan should receive some kind of *retirement* benefit."

J.A. 21 (emphasis added). Hence, Kentucky protects the disabled employee who is *not already* eligible for retirement by providing a *third* route to retirement eligibility. KRS § 16.582. It is called "disability retirement," as distinguished from normal retirement. *Id.*[3]

Eligibility for disability retirement. The uncontroverted evidence (which must be taken as true in this summary judgment posture) was that "the motivating factor behind establishing [disability retirement] benefits, was to provide assistance to members who *would not have a source of income* through unreduced retirement benefits." J.A. 22 (emphasis added). In keeping with this rationale, Kentucky's basic approach is to award the disabled employee a retirement benefit that is roughly equivalent to what she would have earned had she worked up to the closest milestone of retirement eligibility. If, for example, the first date of eligibility for an employee would have come only after the employee worked 20 years, then the employee is accelerated to that milestone of service

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[3] As the Court of Appeals noted, the Kentucky Legislature has made technical changes to how eligibility for disability retirement is described. J.A. 39 n.1. The 1998 version of the statute provided that an employee was not eligible to receive disability retirement benefits unless he was "less than normal retirement age." *Id.* Since 2000, the trigger is described, more accurately, as being when the employee is "eligible for an unreduced retirement allowance." KRS 16.577(2) (2001). The change was only cosmetic; there is no dispute that eligibility for service retirement (and not just "retirement age") would have disqualified an employee from disability retirement at all times to this case. *Id.* §§ 16.505(15), 16.582(5)(a) & (b).

retirement. If, however, the employee would have first been eligible upon reaching 55 with five years of service, then the employee would be accelerated to that milestone of normal retirement. Either way, the disabled employee would be boosted to that critical juncture of entitlement to an unreduced benefit, just like employees who reach eligibility for normal retirement.

Benefits calculation. Kentucky imputes those additional years of service to the disabled employee for purposes of calculating the amount of the benefit as well. KRS § 16.582(5)(a). The employee who started at 20 and becomes disabled at 35 will be credited with five additional years of service—the number of years it would take to get to the first eligibility milestone (20 years, for service retirement). The employee who started at 45 and becomes disabled after five years will get an additional five years of service credited--enough to get him to the normal retirement eligibility milestone (55 with at least five years of service).

Through this mechanism, employees who are disabled receive the same, or nearly the same, retirement benefits they would have received had they not become disabled. Some disabled employees will not get exactly the same benefits they would have received but for the disability, because there is a limit to the number of years that will be imputed for purposes of calculating the *amount* of the retirement benefit. Regardless of which eligibility threshold is applied, the number of imputed years is capped at the number of years the employee had worked before becoming disabled. *Id.* So an employee who worked from age 20 to age 30 and then became disabled, will

receive a full credit of 10 years (because he worked 10 years and needs only another 10 years to be eligible for service retirement based upon 20 years of service). But if that same employee was disabled at, say, 27 (after seven years of service), the employee would receive an imputed service credit of only seven years toward the benefits calculation (for a total of 14 years of service). That is because it would take 13 years to get to the point of retirement eligibility, but the number of imputed years is capped at seven, the number of years he has already worked.

Relationship Between Age and Disability Retirement Benefits

As is evident from this description of both the purpose and the mechanics of Kentucky's plan, the benefits available to disabled employees are not a supplement to normal retirement, but a substitute for those who never make it that far. By definition, and design, this third route is inapplicable to an employee who becomes disabled *after* crossing one of the eligibility thresholds for normal retirement. That employee does not need the safety net of the third route to retirement, because she can already claim unreduced benefits by having crossed one of the other two milestones.

As to the calculation of disability retirement benefits, the Kentucky retirement statute does not adopt any rule—express or implied, practical or theoretical—that older employees recover less than younger ones, or get fewer years credited. To the contrary, under many circumstances the older employee fares better than the younger. That is because the organizing principle does not revolve around the employee's age; it revolves around the

employee's eligibility for normal retirement, which sometimes is not a function of age at all (in the case of service retirement), and is never a function of age alone (even in the case of retirement at the threshold of age 55 with five years of service).

Chief Judge Boggs punctuated the point, in his en banc dissent, with three vivid illustrations. The first is an example of two employees who are exactly the same age, but nevertheless end up with different credits toward retirement:

> 1) Take two employees of the same age. One is 48 with 10 years of service, the other is 48 with 15 years of service. They both become disabled. The first employee gets 7 years of extra credit, which takes him to age 55, and the second gets 5 years of extra credit, which takes him to 20 years of service, but in each case it is as if the employee had worked until eligible for normal retirement.

J.A. 93. The second example illustrates how two employees who are years apart in age will end up receiving the same credit:

> 2) Take two employees with the same service. One is 50 with 15 years of service. The second is 35 with 15 years of service. They both become disabled. They each get exactly the same additional credit—5 years—despite the difference in their ages, and with that additional credit, it is as if each had worked until eligible for normal retirement.

Id. The third illustrates how an older employee can end up with many more years of service credit than a younger colleague:

> 3) Take two employees with differing ages and years of service. The first is 45 with 10 years of service. The second is 40 with 17 years of service. They both become disabled. This time, the older worker actually gets a greater benefit because he will get credit for all of the 10 years that would bring him to the retirement age, whereas the younger worker will "max out" at the full 20 years of credit with only an additional 3 years of credit.

J.A. 94. As Chief Judge Boggs succinctly put it: "These examples demonstrate starkly that age is not a controlling variable in the operation of the KRS plan." *Id.* "They also show that the plan provides in practice exactly what" Kentucky set out to achieve, which is, "a way to insure against disability that is sensitive to the greatest loss caused by the disability—the inability to continue earning credits toward retirement at a normal retirement age." *Id.*

An Employee Complains

This case arises from the complaint of one employee, Charles Lickteig, to the Equal Employment Opportunity Commission (EEOC). J.A. 9, 24. Mr. Lickteig joined the Jefferson County Sheriff's Department late in his career, at the age of 44. J.A. 60. After 11 years, he was eligible to retire with a pension, because he reached the normal-retirement milestone, having turned 55 (and passed the five-year threshold). He opted to continue working. J.A. 18. Six years after passing the threshold for retirement eligibility, Mr. Lickteig claimed disability. *Id.* At that point he was 61 years old, and had served nearly 18 years.

In keeping with the plan, Kentucky gave Mr. Lickteig his normal-retirement benefits. *Id.* Like any other employee who is eligible for retirement, his benefits were calculated based upon his final compensation and his almost 18 years of service. J.A. 26. Mr. Lickteig argued that it was unfair to treat him differently from a younger disabled employee who had not already achieved eligibility for retirement. J.A. 28-29.

The EEOC Sues Alleging Intentional Age Discrimination

The EEOC sued Petitioners Kentucky Retirement Systems (KRS), the Jefferson County Sheriff's Department, and the Commonwealth of Kentucky (collectively referred to as "Kentucky") in the United States District Court for the Western District of Kentucky. The EEOC alleged that the statutory provisions describing Kentucky's retirement plan violate the ADEA. J.A. 9-16. Specifically, the EEOC alleged that "since at least October 16, 1992, Defendants have discriminated against a class of individuals aged forty (40) or over on the basis of age by maintaining a disability retirement program which denies benefits or pays reduced benefits, because of age." J.A. 9.

The EEOC's sole theory was disparate treatment—that the Kentucky retirement statute intentionally discriminates against older employees. J.A. 12. The EEOC does not contend that an older public servant in Kentucky necessarily receives lower benefits than a younger one. Rather, the EEOC claims that there are circumstances where that can happen. J.A. 74-75; 88-89 & n.3. Because of that possibility, the EEOC asserts, the statutory scheme discriminates on its

face against older workers.

The Age Discrimination Claim Is Dismissed on Summary Judgment

The parties cross-moved for summary judgment. Kentucky "argue[d] that, contrary to the EEOC's assertion, the KRS plan does not violate the ADEA because the policy does not discriminate '*because of* age,'" J.A. 71 (emphasis added); the focal point of the inquiry is not age, but eligibility for retirement. J.A. 31. Kentucky also argued that any consideration of age in certain circumstances does not violate the ADEA, because age was not a motivating factor in the retirement statute's design. J.A. 72, 80.

In support of its motion, Kentucky introduced the evidence quoted above establishing that "the motivating factor behind" the disability retirement provisions was "to provide assistance to members who are unable to continue working, but would not have a source of income through unreduced retirement benefits." J.A. 22.

The EEOC offered no evidence countering this explanation. Instead, the EEOC argued that regardless of the undisputed "motivating factor" behind the disability provisions, the statute illegally discriminates: Just because age could be a factor in determining eligibility for disability retirement, and the calculation of benefits, the statute violated the ADEA on its face.

Rejecting the EEOC's argument, the District Court granted summary judgment in Kentucky's favor on two grounds. J.A. 32. First, the District Court rejected the EEOC's argument as "illogical." J.A. 28. The Court explained that "age will always

be a factor in retirement plans," so the mere use of age as a factor in the statute was not enough to make the statute facially discriminatory. J.A. 32. Second, the District Court also held that even if the Kentucky retirement statute did differentiate "because of ... age," that does not establish a prima facie case. *Id.* Liability under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, depends on whether age *actually* motivates the decision of the party accused of discrimination," and there was no such evidence in this case. J.A. 27-28 (emphasis added).

The Court of Appeals Panel Affirms

The EEOC appealed to the Court of Appeals for the Sixth Circuit. The centerpiece of its appeal was a series of charts intended to establish that the statute may have a disparate *impact* on older workers, which is irrelevant in a disparate-treatment case. J.A. 42; *see also* J.A. 64. Kentucky countered by citing an equal number of examples in which a younger worker would receive less imputed service than an older one. The three-judge panel unanimously held that the statute did not violate the ADEA. J.A. 48, 54. Relying on an earlier precedent involving a similar plan, the panel echoed the District Court's analysis on both points. First, "'the ADEA protects workers only from an employer who intended discrimination *because of* age.'" J.A. 46 (quoting *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 138 (6th Cir. 1995)). Second, "the EEOC has failed to demonstrate discriminatory intent." J.A. 49. The panel also noted that an employee who begins work when older will have less time to accumulate years of service and therefore will receive a lower benefit

upon reaching the eligibility for normal retirement, all other things being equal. J.A. 47.

The En Banc Court Reverses, Over a Vigorous Dissent

The Court of Appeals granted rehearing en banc, and a sharply divided court reversed, disagreeing with both the District Court and the unanimous panel.

Majority opinion. The en banc majority held that the EEOC had established a prima facie case of discrimination. J.A. 59. Rejecting Kentucky's argument that the statute did not discriminate "because of ... age," the Court of Appeals held that Kentucky's retirement statute was "facially discriminatory on the basis of age" for two reasons: "First, ... the plan categorically excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age." J.A. 73 (emphasis in original). Second, "employees who become disabled when they are still 'young enough' to be eligible for retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." J.A. 74.

The Court of Appeals also rejected Kentucky's argument that the EEOC has to prove discriminatory motive to establish a prima facie case. J.A. 77-80. The court correctly observed that Congress believed there was "no evidence of prejudice based on *dislike or intolerance* of the older worker." J.A. 80-81 (internal quotation marks omitted; emphasis added). Rather, Congress was motivated "to fight arbitrary age-

based *assumptions* that lacked a basis in fact." J.A. 81. The court characterized Kentucky's argument as "mean[ing] that in passing the ADEA, Congress intended to prohibit only a type of age discrimination that it had been advised did not exist"—which, obviously, would be "nonsensical." J.A. 80-81. But the court never addressed Kentucky's argument that there is no ADEA violation unless a plan was arbitrary in that it indulged ageist assumptions.

Dissent. Chief Judge Boggs wrote a dissent that three other judges joined. The dissenting judges insisted that Kentucky's statute did not discriminate "because of ... age." J.A. 90. Indeed, it was clear to the dissent that "impermissible stereotyping had nothing to do with the age-correlated features of the plan." J.A. 96. They argued that "[u]nder the KRS plan, the employee's age *in relation to his years of service with the employer* factors into retirement benefits calculations." *Id.* (emphasis in original). But "[a]ge in relation to years of service performed for this employer," they insisted, "is not the same as age qua age." *Id.* (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993), for the proposition that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore").

The dissenters took note of the irony of "dubiously labeling that plan as facially discriminatory under the ADEA." *Id.* As the dissent observed, Kentucky finds itself in this awkward position precisely because it went out of

its way to devise a retirement plan that was especially generous to older workers. "Those most 'disadvantaged' are those who were oldest at the time of hiring." J.A. 97 (quoting *Lyon*, 53 F.3d at 140 n.6). Thus, Kentucky's "very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated plaintiff's 'problem.'" *Id.* (quoting *Lyon*, 53 F.3d at 140 n.6). In the end, the dissenters concluded that the majority had used the ADEA "to invalidate a policy that lies far from the 'essence' of the ADEA—and, in fact, does not implicate that essence at all." J.A. 96. "It would be contrary to the letter, as well as the spirit, of the ADEA to penalize the employer for the incidental ramifications of objectivity." J.A. 97 (quoting *Lyon*, 53 F.3d at 140 n.6).

SUMMARY OF ARGUMENT

This is a disparate treatment case. The EEOC cannot prevail by showing merely that some older disabled employees may not fare as well as some younger ones under the Kentucky retirement statute. The Court of Appeals' judgment must be reversed unless the EEOC demonstrates that Kentucky's retirement statute "*discriminate[s]* against" older employees "*because of* [their] age." 29 U.S.C. § 623(a)(1) (emphasis added). The EEOC fails for two independent reasons: (I) any differentiation among disabled employees is not "because of [their] age"; and (II) Kentucky's retirement statute does not "discriminate" in the sense in which Congress used the term in the ADEA.

I. Kentucky's retirement statute does not differentiate among categories of disabled

employees "because of ... age." It differentiates disabled employees who are eligible for normal retirement from those who are not.

The disability plan is a safety net reserved for those employees who have not made it to normal retirement. It is only natural to define eligibility for the safety net with reference to when the safety net is needed. An employee who is *already* eligible for normal retirement benefits is not eligible for disability retirement, because he does not need it. The ineligibility is not "*because of* [his] age." He is ineligible for disability retirement because of his eligibility for another source of income.

Several structural elements of Kentucky's statute confirm that any differential treatment—whether as to eligibility or as to the calculation of benefits—is not "because of ... age," but because of retirement eligibility. First, all the rules—as to eligibility and benefits calculation—apply with equal force to all employees who are eligible for normal retirement, including those who are eligible because they have reached the 20-year milestone of service retirement (which has nothing to do with age). Second, for many employees, age simply has no bearing either on eligibility for disability retirement benefits or on the amount of those benefits. Third, sometimes older disabled employees fare better than younger ones.

The distinction between a policy that revolves around eligibility and one that revolves around age is dispositive. Both this Court's ADEA jurisprudence and its Title VII jurisprudence underscore the distinction. In either context, the overarching rule as to the meaning of "because of" is the same: "a disparate treatment claim cannot

succeed unless the employee's protected trait actually played a role in that process *and had a determinative influence on the outcome.*" *Hazen Paper*, 507 U.S. at 610 (emphasis added). There is no disparate treatment claim when there is a "lack of identity between the excluded disability and [the protected trait] as such." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976) (internal quotation marks omitted).

II. There is a second, and independent, reason that the EEOC has not established a prima facie case of age discrimination: Even if the disability provisions of the Kentucky retirement statute could be said technically to *differentiate* among employees "because of ... age," the difference does not amount to "*discriminat[ion]*"—in the sense in which Congress used that term in the ADEA.

In the ADEA, Congress declared that its "purpose" was not to prohibit all differentiations on the basis of age, but only "to prohibit *arbitrary* age discrimination in employment." 29 U.S.C. § 621(b) (emphasis added). As this Court has held, Congress was "aware that there were legitimate reasons as well as invidious ones for making employment decisions on age." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). And Congress intended to target only discrimination that was "arbitrary," in the sense of being based upon "inaccurate and stigmatizing stereotypes." *Hazen Paper*, 507 U.S. at 611.

Contrary to the Court of Appeals' view, the EEOC could not establish a prima facie case just by pointing to the statute itself, unless the arbitrariness—i.e., stereotype-based motivation—appears on the face of the statute. In this respect,

the rules governing how and when it is permissible to draw such definitive inferences of discriminatory intent in an age discrimination case apply differently from the rules governing such inferences in cases involving explicit classification on the basis of race or gender. The application must differ because Congress believed (and this Court has held) that the nature of the discrimination is different.

Because Kentucky's retirement statute is not arbitrary—i.e., not based on inaccurate ageist stereotypes—the EEOC has failed to establish a prima facie case of age discrimination. It is rational to provide the safety net of disability benefits only to those who are not yet eligible for retirement benefits. That is what private insurers do, and what Congress did in its Social Security Disability program. The truth is, Kentucky's retirement statute is extraordinarily favorable to older workers. The irony of this case is that the very attribute that makes the plan so attractive to older workers—the ability to retire at age 55 after have spent little time on the job—is the feature that the EEOC has condemned as age discrimination.

ARGUMENT

I. THE EEOC FAILED TO ESTABLISH A PRIMA FACIE CASE BECAUSE KENTUCKY'S RETIREMENT STATUTE DOES NOT DIFFERENTIATE AMONG EMPLOYEES "BECAUSE OF ... AGE."

Kentucky's retirement statute does not differentiate among categories of disabled employees "because of ... age." It differentiates between disabled employees who are eligible for

normal retirement and those who are not. *See* Point I.A. Under this Court's precedents, that distinction is dispositive. *See* Point I.B. The Court of Appeals erred in concluding that the Kentucky retirement statute is discriminatory on its face simply because age is a factor in reaching one milestone to normal retirement. *See* Point I.C.

A. Kentucky's Retirement Statute Does Not Differentiate "Because of" Age, But Differentiates Based Upon the Availability of a Retirement Safety Net.

The EEOC concedes that Kentucky's eligibility rules for normal retirement are perfectly legal. It is, of course, permissible to premise retirement benefits on an employee's length of service. And it is so routine to condition retirement benefits on reaching a particular age, that it is not much of an overstatement to say "all retirement plans necessarily" do it. *United Air Lines*, 434 U.S. at 207 (White, J., concurring). If Kentucky's retirement statute had limited itself to providing retirement benefits only to employees who reached either of the two milestones for normal retirement, the EEOC would never have brought this case.

This case is here because Kentucky opted to boost unfortunate employees who become disabled *before* reaching eligibility for normal retirement. Had Kentucky behaved like many employers in the private sector, employees in this category would have no income to sustain them once they became disabled—no salary, no disability benefits, and no retirement benefits. But the EEOC claims that the special accommodation is illegal. The EEOC alleges age discrimination along two dimensions: (1) in the rules governing eligibility for disability

retirement; and (2) in the calculation of benefits. It is wrong on both fronts.

As to eligibility, it is only natural to define eligibility for a safety net with reference to when the safety net is needed. An employee who is *already* eligible for normal retirement benefits is not eligible for disability retirement, because he does not need it. The ineligibility is not "because of [his] age." He is ineligible for disability retirement *because* of his eligibility for another source of income. He is ineligible for disability retirement because he has already reached the goal of the statute—normal retirement.

To argue otherwise is like accusing an employer of age discrimination for refusing to pay a salary to a retired employee. To be sure, the employee who retires when he reaches retirement age is deprived of a salary that younger employees are earning. He, too, can say that but for his age he would never have retired. But the reason for the differentiation is not because the employee is 55, but because the employee is retired.

The same principles apply to the calculation of benefits. It is possible that a disabled employee who is 54 will receive a lower benefit than an employee who is 35 with the same years of service. But if so, the differential treatment is not because of their respective ages per se, but because of their relative proximity to (or distance from) a lawful retirement eligibility milestone—whichever milestone it may be.

Likewise, it is true that Mr. Lickteig was not credited with the additional couple of imputed years that a disabled employee of 40 would have

received with the same nearly 18 years of service. But that, again, is not *because* Mr. Lickteig was 61. It is because he was eligible for normal retirement, and the 40-year-old is not. Thus, with regard to the controlling factor—proximity to normal retirement—the two are not similarly situated. Nor are they similarly situated with regard to the motivating philosophy underlying the disability safety net. An employee in Mr. Lickteig's position has had an extra 21 years to devote to making money, providing for himself and his family, saving funds for retirement, and accruing years that will increase his retirement benefits. Thus, the 40-year-old employee is likely to need more of a boost.

Several structural elements of Kentucky's statute confirm that any differential treatment[5] whether as to eligibility or as to the calculation of benefits—is not "because of ... age," but because of retirement eligibility. First, all the rules—as to eligibility and the benefits calculation—apply with equal force to an employee who is closer to the 20-year milestone. Regardless of which milestone is closer, the statute directs that: (1) the employee accelerates to that retirement milestone; and (2) the employee is credited the years it will take him to get to the relevant milestone.

Second, for many employees, age simply has no bearing either on eligibility for disability retirement benefits or on the amount of those benefits. For anyone who would be destined to reach the 20-year service threshold before turning 55 (i.e., anyone who started work before age 35), age is irrelevant to the equation.

Third, as Chief Judge Boggs illustrated, an older disabled employee could fare better than a

younger one. *See supra* at 10 (example 3); J.A. 94. A 40-year-old firefighter with 17 years of service is just as likely to become disabled as a 45-year-old firefighter with 10 years of service. The younger firefighter gets three years of imputed service, bringing him to 20 years of service; the 45-year-old gets 10 years of imputed service bringing him to age 55 (with at least five years of service). The *older* one gets more of a boost.

In short, the factors that dictate both eligibility for disability retirement and the amount of the benefit are the factors described in the statute itself: (1) whether the employee is already eligible for normal retirement; (2) if not, how far the employee is from the point of being eligible for normal retirement; and (3) how long the employee has already worked. Sometimes, there will be a correlation between age and the outcome of that inquiry, but that is nowhere near the same as the assertion that benefits are granted or denied "because of ... age."

B. Under this Court's Precedents, the EEOC Cannot Establish a Prima Facie Case of Age Discrimination with Such an Imperfect Correlation Between Age and Benefits.

This Court's age discrimination precedents confirm that Kentucky's retirement statute does not differentiate "because of ... age." *See infra* Point I.B.1. And this Court's Title VII cases reinforce the conclusion. *See infra* Point I.B.2.

1. This Court's age discrimination cases confirm that the EEOC has not made out a prima facie case of discrimination.

Two ADEA cases provide the guideposts against which to measure Kentucky's statute. On one side of the line is *Hazen Paper*, 507 U.S. 604. There, an employer fired an employee because his retirement benefits were about to vest. *Id.* at 612. The employee asserted that firing on that basis constituted age discrimination. Obviously, there was a strong correlation between age and retirement vesting. *Id.* at 611. As this Court noted, "On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with the employer." *Id.*

Nevertheless, this Court rejected the claim—unanimously. The Court put the controlling legal principles simply and starkly: "[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609. The Court articulated the rule that applies, regardless of whether the policy is adopted formally or ad hoc: "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process *and had a determinative influence on the outcome.*" *Id.* at 610 (emphasis added). This Court held that the correlation with age was not enough to carry the day: "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a

decision based on years of service is necessarily 'age based.'" *Id.* at 611.

On the other side of the divide is *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). TWA had adopted a policy allowing captains who were disqualified from continuing as pilots to bid on positions as flight engineers. *Id.* at 116. The disqualified pilots could even "bump" less senior flight engineers. *Id.* at 116-17. But the policy had a big exception: Captains who were disqualified from continuing to fly because they were approaching age 60 were not allowed to bump less senior engineers. *Id.* at 118. If they could not land a spot as a flight engineer through the normal contract bidding process, they had to retire at age 60. *Id.* The rules treated a captain who was disqualified from flying because he was incompetent better than a captain with an impeccable flying record who was disqualified solely because he was turning 60.

This Court found the policy facially discriminatory because the terms governing whether a captain could bump a flight engineer depended solely on the captain's age. *Id.* at 120-21. The discrimination exhibited what this Court later described as "the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper*, 507 U.S. at 610.

Kentucky's retirement statute falls on the *Hazen Paper* side of the line. As in *Hazen Paper*, but unlike in *Thurston*, "the factor motivating the employer is some feature other than the employee's

age." *Id.* at 609. In fact, this case involves a flip side of the same decisive factor—eligibility to retire. In *Hazen Paper*, the distinguishing feature was that the employee was about to become eligible to retire, whereas here, the distinguishing feature is whether an employee is already eligible to retire. Either way, organizing a plan around eligibility for retirement is not the same as organizing a plan around age—and it is certainly more laudable than organizing a policy around the goal of cheating employees out of their pension benefits entirely. Here, as in *Hazen Paper*, "the employee's protected trait" did not have "a *determinative* influence on the outcome," for, as we have shown, there are numerous circumstances where age is irrelevant and many where younger employees fair better. *Id.* at 610 (emphasis added). Here, as there, age is "analytically distinct" from the decisive factor. *Id.* at 611.[4]

Unlike in *Thurston*, nothing about Kentucky's retirement statute so much as suggests a view that "the employer believes that productivity and competence decline with old age," or any other "inaccurate and stigmatizing stereotypes." *Id.* at 610. As Chief Judge Boggs aptly put it, this sort of stereotyping "is nowhere found in the plan under consideration today." J.A. 86.

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[4] *Hazen Paper* did "not consider the special case where an employee is about to vest in pension benefits as a result of his *age*, rather than years of service, and the employer fires the employee in order to prevent vesting." *Id.* at 613 (emphasis in original). But, for reasons explained later, that distinction does not change the result. *See infra* at 32-41 (Point I.C.).

In the end, this Court's ultimate conclusion in *Hazen Paper* applies with equal force here: "The prohibited stereotype ('Older employees are likely to be— ') would not have figured in this decision, and the attendant stigma would not ensue," under Kentucky's retirement statute. 507 U.S. at 612. Just as in *Hazen*, any "decision" to deny benefits "would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee," and his relationship to retirement eligibility. *Id.* There, the employer accurately concluded "that [the employee] indeed is 'close to vesting,'" *id.*; here Kentucky accurately discerns that the employee has, indeed, become eligible to retire.

2. This Court's other discrimination cases support the same conclusion.

As this Court has noted, discrimination cases arising under Title VII can be instructive. *See Smith v. City of Jackson*, 544 U.S. 228, 233 & n.4 (2005). For reasons that will be explained fully below, Congress recognized that there are differences between age and other protected characteristics, and those differences can translate into doctrinal differences. *See infra* at 42-45. Even overlooking those differences, for the time being, the Title VII discrimination cases fully support the conclusion that the Kentucky retirement statutes do not discriminate "because of ... age."

The gender and race discrimination cases draw the same line that this Court's ADEA cases reveal. On one side of the divide are policies—like the one at issue in *Thurston*—that discriminate "because

of" the protected characteristic. Thus, for example, in a pair of Title VII cases, this Court has disapproved of retirement provisions that treated women differently from men. One required women to pay higher contributions than men. See *L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 705 (1978). The other offered lower annuities to women than to men even though they had made the same contributions. *See Ariz. Governing Cmte. for Tax-Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1074 (1983). Under both plans, women were treated differently specifically because they were women. No woman could ever receive the same retirement treatment as a similarly situated man, much less more favorable treatment. In each case, the employer offered the justification that women tend to outlive men. *See Norris*, 463 U.S. at 1083; *Manhart*, 435 U.S. at 704. This Court rejected these justifications as based on the very sort of stereotypes that are impermissible. *See Norris*, 463 U.S. at 1083; *Manhart*, 435 U.S. at 707.

Similarly, this Court struck an employment policy in which women of reproductive age were expressly barred from favorable assignment in a factory because of environmental hazards deemed harmful to unborn children. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991). Male employees of reproductive age were also at risk for passing along the same genetic damage as a result of the same environmental factors. *Id.* at 198. Nevertheless, the employer's policy barred only women—solely because of their gender—from the more desirable and lucrative assignment. *Id.* This Court found

the policy discriminatory because the protected trait—and only the protected trait—motivated the employer's policy.

On the other side of the divide are circumstances—as in *Hazen Paper*—where there might be a *correlation* between the inferior treatment and the protected classification, but the differential treatment is not "because of" the protected classification. Especially noteworthy in this regard is *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The employer there provided disability benefits to all employees who were disabled. *Id.* at 128. But if a woman was disabled due to pregnancy, she could not collect disability benefits. *Id.* at 129. Under the plan, "pregnancy affords the only disability, sex-specific or otherwise, that [wa]s excluded from coverage." *Id.* at 152 (Brennan, J., dissenting). Several women brought *gender* discrimination claims under Title VII. [5]

This Court held that "exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136. The Court drew heavily from a case reaching the same conclusion with regard to a similar statutory exclusion that was alleged to constitute gender discrimination in violation of the Equal Protection Clause. *See Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974). Quoting liberally from that case, the Court acknowledged that "'it is

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[5] At the time, Congress had not yet prohibited discrimination on the basis of pregnancy. *See* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

true that only women can become pregnant,'" but "it does not follow that every ... classification concerning pregnancy is a sex-based classification." 429 U.S. at 134 (quoting *Geduldig*, 417 U.S. at 496). Critical to the Court's holding was the conclusion that there is a "'lack of identity between the excluded disability and gender as such.'" *Id.* at 135 (quoting *Geduldig*, 417 U.S. at 496 n.20). This Court explained:

> "'The program divides potential recipients into two groups—pregnant *women* and nonpregnant *persons*. While the first group is exclusively female, the second includes members of both sexes.'"

Id. (quoting *Geduldig*, 417 U.S. at 496 n.20) (emphasis added).

This case falls on the *Gilbert* side of the discrimination dividing line for the same reason that it falls on the *Hazen* side of the ADEA dividing line: Both the operative rule for eligibility and the underlying motivation are not about status in the protected class or stereotypes rooted in that status.

Gilbert is especially on point, because the parallels to this case are so stark. There, as here, the challenge boiled down to an employer's decision to offer "an insurance package, which covers some risks, but excludes others." *Id.* at 138. In *Gilbert*, the employer chose to exclude from coverage one sort of disability (pregnancy-related disability); here the employer opted to exclude from coverage those who already have a retirement safety net. But just as "gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-

inclusive," *id.* at 138-39, so, too, here, age-based discrimination does not result just because Kentucky's disability retirement benefits do not include every disabled employee, whether or not eligible for retirement.

In fact, this Court's analysis in *Gilbert* applies with even greater force here. In *Gilbert*, women were the only ones who would ever be excluded from disability coverage. But here, as has been demonstrated, the operative rule (distinguishing based on retirement eligibility) excludes employees outside the protected class (younger employees, who have crossed the 20-year threshold) just as it excludes those who are in the protected class (older employees who have crossed the threshold of 55 with five years of service).

C. The Analysis Does Not Change Just Because Age Can Be a Factor in Determining Retirement Eligibility.

Even though Kentucky's retirement statute does not categorically treat older employees worse than younger ones, and despite the above precedents, the Court of Appeals held that Kentucky's retirement statute discriminates on its face. In so holding, the Court of Appeals placed dispositive weight on the fact that Kentucky's retirement statute sometimes considers age as a factor in determining *eligibility for normal retirement*, which, in turn, is the central organizing feature of the challenged provisions governing benefits for disabled employees. The Court of Appeals misapprehended the relationship between age and disability retirement under Kentucky's statute. *See infra* Point I.C.1. The Court of Appeals also incorrectly read *Public Employees*

Retirement System v. Betts, 492 U.S. 158 (1989), as support for its conclusion. *See infra* Point I.C.2.

1. The Court of Appeals' analysis of the factor of age was flawed.

The Court of Appeals did not question two propositions that should dictate the outcome of this case. The first is that it is permissible to base retirement eligibility on age. The second is that it is permissible to provide disability benefits only to employees who are not yet eligible to retire, and to calculate disability payments based upon how far an employee is from retirement eligibility. Thus, for example, neither the EEOC nor the Court of Appeals would have any trouble with conditioning disability benefits (or calculating them) based upon how far an employee is from reaching a retirement eligibility milestone of, say, 20 years of service. The Kentucky retirement statute does that. But since eligibility can also depend upon age (with a minimum service requirement), the Kentucky retirement statute also combines the two propositions, effectively conditioning disability benefits (and calculating them) on the basis of that eligibility milestone as well. The Court of Appeals never grappled with why it would be permissible to condition benefits on one eligibility milestone but not the other, when both milestones are equally legal.

The basic analytical flaw. The Court of Appeals' analysis boiled down to a simplistic theorem:

1. When benefits to a disabled worker are based on eligibility, and eligibility can be based on age, age might determine a benefits outcome.

2. A statute is facially discriminatory if age determines any outcome.

3. Thus, the Kentucky retirement statute is facially discriminatory.

The theorem has a certain superficial attractiveness as a general principle of discrimination law. It would almost certainly hold true if the word "age" were replaced with "gender" or "race." But on closer inspection, that is because the first postulate of the theorem would always be a nonstarter in those circumstances: An employer could never set eligibility criteria for a retirement plan based on gender or race. Kentucky's retirement statute would violate Title VII if it set an eligibility criterion, for example, of "female with five years of service."

The theorem breaks down in the context of age, however, precisely because it *is* permissible to let age dictate eligibility for retirement. Thus, it should not be considered facially discriminatory to let age become a factor in benefits that depend on eligibility for retirement.

To hold otherwise would yield a perverse result. An older employee—say, one who begins working at age 45 or 50—could derive enormous benefit from a plan that allows him to retire with undiminished benefits at age 55 (without coming close to serving 20 years). Yet, the employee could then insist that, for purposes of calculating other retirement-related benefits, the employer must ignore his age and treat him as if he had always been subject only to the 20-year milestone. That is the point the Court of Appeals elides throughout its analysis both on eligibility for disability

retirement and on the calculation of benefits.

Eligibility. As to eligibility, the Court of Appeals' analysis is captured in the following passage:

> In order to be eligible for disability retirement benefits, employees ... must become disabled before they reach age fifty-five... [W]hen such an employee becomes disabled at age fifty-five or older, that older employee is adversely treated because of his or her age when compared to a disabled coworker who is similarly situated in all relevant respects other than age.

J.A. 73-74. This passage exhibits three analytical flaws.

First, the Court of Appeals has turned the whole retirement statute upside down. Employees do not become "eligible for disability retirement benefits" by "becom[ing] disabled before they reach age fifty-five." As is explained above, the statute is designed to allow an employee who becomes disabled *before reaching* retirement eligibility a way nevertheless to become eligible for *retirement* benefits. So, "when such an employee becomes disabled at age fifty-five or older," it is completely incorrect to say that "that older employee is adversely treated ... compared to a disabled coworker who" has not yet reached retirement eligibility. That is like a person who is gainfully employed complaining that welfare discriminates against him, because he is "adversely treated" compared to one who is on the dole.

The second flaw is the converse of the first: It is equally convoluted to condemn disability

retirement as a program that treats "similarly situated" employees differently. With regard to eligibility for normal retirement, a disabled employee who has not reached retirement eligibility is not "similarly situated" to one who has. The latter would get retirement benefits, with or without the disability. The former would not—but for Kentucky's decision to provide the safety net of disability retirement. The provisions that are being challenged here, then, are responsible for allowing disabled employees who have not reached another retirement milestone to be similarly situated to those who have.

Third, the Court of Appeals has isolated age as if it were the only factor in play. Even if the first sentence of the above-quoted passage were otherwise accurate, it would be horribly incomplete. A more complete (though still inapt) rendition of the proposition would include the following italicized language: "In order to be eligible for disability retirement benefits, employees ... must *either [1]* become disabled before they reach age fifty-five *or [2] become disabled before serving 20 years.*" There is a difference, for the more complete rendition makes it clear that age matters only because it is a critical component of an eligibility milestone, and not because Kentucky discriminates against older employees.

The difference is especially stark when we consider what conclusion the Court of Appeals' logic would yield if it focused on service retirement rather than the age factor. The proposition would be:

> When such an employee becomes disabled *after working 20 years*, that *more senior* employee is adversely treated because of his or her *experience* when compared to a disabled coworker who is similarly situated in all relevant respects other than *years of service*.

Just as it would be odd to say that a "senior employee is adversely treated *because of* his or her *experience*," it is equally nonsensical to say here that an "older employee is adversely treated *because of* his or her *age*."

Benefits calculation. Similar flaws infect the Court of Appeals' conclusion that the Kentucky retirement statute "is facially discriminatory in a second way, in that [Kentucky] employees who become disabled when they are still 'young enough' to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age." J.A. 74.

First, the two are not "similarly situated." A 20-year-old rookie police officer who gets shot on the first day on the job is not situated the same as he would be if he had gotten shot on his twentieth anniversary. Similarly, if Mr. Lickteig had become disabled on his first day on the job, when he was 44, he would not have been in the same boat as he was when he became disabled after accruing almost 18 years of retirement credit, at age 61. When the statute gives more of a boost to disabled employees who have fewer years of service under their belt, it is because those employees typically need more of a boost. The same is likely true of employees who are otherwise further from attaining normal retirement eligibility. The premise of the statute is

that, as a general rule, the less time you've had to work, the less opportunity you've had to build your financial security. That premise may not reward the less frugal or diligent, but it does not "discriminate ... because of ... age."

Second, once again, the statement is incomplete. To fully capture what the statute does, the Court of Appeals should have added that "employees who become disabled when they are still '*junior* enough' to be eligible for disability-retirement benefits *based on the 20-year milestone* receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their *seniority*." Again, the more complete statement underscores that any difference in treatment is based upon how far away the disability milestone is, not on age per se.

Third, regardless of which eligibility milestone is used, the point of the imputed service feature for disabled employees is to treat the member as if he had more years than he actually worked. The sole purpose is to get the member to a normal retirement milestone in the shortest time possible. The imputed service "fills the gap" created by a disabling event that cut the employee's working life short. The Court of Appeals wrongly concluded that an employee is awarded the enhanced benefit "for no reason other than ... age." J.A. 74. That is not true. The employee who is further away from retirement receives a larger benefit because he is facing a longer gap and needs a bigger safety net to fill it. The design favors the worker who needs the most time to reach normal retirement, as that is the person with the biggest need for a safety net. Sometimes that worker is younger and sometimes

older. Sometimes the gap is filled most quickly by age plus service; sometimes by service alone; but, it is never age qua age that determines the outcome.

2. The Court of Appeals misread this Court's holding in *Betts*.

The Court of Appeals incorrectly believed that this Court's opinion in *Public Employees Retirement System v. Betts*, 492 U.S. 158—coupled with a statute overruling it—supports its conclusion that the Kentucky retirement statute impermissibly considers age. J.A. 75-77.

In *Betts*, this Court addressed an age discrimination claim against a different retirement plan. The focus of the opinion was not on the validity of the plan, but on a statutory provision that exempts from ADEA coverage age-based decisions taken "to observe the terms of ... any bona fide employee benefit plan such a retirement, pension or insurance plan, *which is not a subterfuge* to evade the purposes of" the ADEA. 29 U.S.C. § 623(f)(2) (1988) (emphasis added). The Court indicated that any plan that predated the ADEA, was likely not "a subterfuge to evade" the ADEA. 492 U.S. at 168. The practical result was that a retirement, pension, or insurance plan that used age in a blatantly discriminatory way could not be found to violate the ADEA. Congress passed the Older Workers Benefit Protection Act (OWBPA) to remove the "subterfuge" language, so that preexisting employee benefits plans would also be subjected to ADEA strictures. Pub. L. 101-433, § 101, 104 Stat. 978, 978 (1990).

From this course of events, the Court of Appeals drew three inferences: (1) "that the

Supreme Court found" the plan under review in *Betts* "to be facially discriminatory," J.A. 75; (2) that "Congress intended to prohibit the very sort of age-based discrimination" that was involved in *Betts*, J.A. 75-76; and (3) that the Kentucky retirement statute "closely resembles the characteristic of the plan in *Betts*," J.A. 75. If the Court of Appeals was wrong about any of these propositions, then its ultimate conclusion—that "Congress intended to prohibit the very sort of age-based discrimination" that is on display "in this plan"—fails. J.A. 76. The Court of Appeals was wrong on all three.

First, this Court did not address whether the plan before it in *Betts* was facially discriminatory; it did not need to because the Court's conclusion about the broad scope of the "subterfuge" language obviated any such inquiry. *See* 492 U.S. at 161 ("In the case before us, we must consider the meaning and scope of the [OWBPA] exemption."). All the Court did was to note that "on its face, the ... scheme renders covered employees ineligible for disability retirement once they have attained age 60." *Id.* at 166. That was a predicate to the Court's conclusion that the denial of disability benefits to the claimant fell within the terms of the exemption, because it "therefore qualifies as an action 'to observe the terms of' the plan." *Id.* It was not even close to a holding that the statute is "facially discriminatory."

Second, in enacting the OWBPA, Congress was focused on eliminating the blanket immunity for older retirement plans. It wanted to be sure plans, like the one before the Court in *Betts*, would not be impervious to ADEA scrutiny. Congress was not

fixated on making sure that the specific plan at issue in *Betts* could never survive an ADEA challenge.

Third, while there are superficial similarities between the plan in *Betts* and Kentucky's retirement statute, the two differ in one very important respect. To begin with the similarities, like Kentucky's retirement statute, the plan in *Betts* prescribed two routes to retirement eligibility: (1) serving a number of years (regardless of age); and (2) reaching a certain age (for the plaintiff there, 60) plus a smaller number of years of service. *Id.* at 162. In addition, the plan provided a separate disability plan for employees who became disabled after working a prescribed number of years. *Id.* But, as Chief Judge Boggs noted in the dissent below, J.A. 92, unlike in Kentucky, the disability benefits in *Betts* were not conditioned on eligibility for retirement; they were conditioned expressly on age qua age. Only employees who had worked five years and were under 60 could receive benefits. *Betts*, 492 U.S. at 162. An employee who was over 60 never could get disability benefits, even though employees who were eligible to retire through the other route (length of service, alone) still could receive disability benefits.

* * *

In sum, neither law nor logic supports the Court of Appeals' conclusion that the Kentucky retirement statute differentiates "because of ... age." For that reason, alone, the judgment must be reversed.

II. THE EEOC HAS NOT ESTABLISHED A PRIMA FACIE CASE BECAUSE KENTUCKY'S DISABILITY RETIREMENT STATUTE DOES NOT "DISCRIMINATE," IN THAT ITS REFERENCE TO AGE IS NOT ARBITRARY.

There is a second, and independent, reason that the EEOC has not established a prima facie case of age discrimination: Even if the disability provisions of the Kentucky retirement statute could be said technically to differentiate employees "because of ... age," the difference does not amount to "*discriminat[ion]*"—not, at least, without some evidence of animus or inaccurate age-based stereotyping. In a disparate treatment case, "[p]roof of discriminatory motive is critical." *Hazen Paper*, 507 U.S. at 609.

The ADEA was directed only at "arbitrary" discrimination—discrimination motivated by inaccurate stereotypes. *See infra* Point II.A. Contrary to the Court of Appeals' view, the EEOC could not establish a prima facie case just by pointing to the statute itself, unless the arbitrariness appears on the face of the statute. *See infra* Point II.B. Because Kentucky's retirement statute is not arbitrary—i.e., not based on inaccurate ageist stereotypes—the EEOC failed to establish a prima facie case of age discrimination. *See infra* Point II.C.

A. The ADEA Targets Only "Arbitrary" Age Discrimination, Defined as Discrimination Based on Inaccurate Stereotypes.

In passing the ADEA, Congress declared that it

did not intend to prohibit all differentiations on the basis of age. It was concerned only with "the setting of *arbitrary* age limits regardless of potential for job performance." 29 U.S.C. § 621(a)(2) (emphasis added); *id.* § 621(a)(4) ("arbitrary discrimination in employment because of age ... burdens commerce"). Accordingly, Congress announced that the ADEA's "purpose" was only to "prohibit *arbitrary* age discrimination in employment." *Id.* § 621(b) (emphasis added).

As this Court has repeatedly recognized, that was because Congress concluded that age discrimination is different from other types of discrimination: It was "aware that there were legitimate reasons as well as invidious ones for making employment decisions on age." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004). That was why, initially, "Congress chose not to include age within discrimination forbidden by Title VII of the Civil Rights Act of 1964." *Id.* at 586. "Instead it called for a study of the issue by the Secretary of Labor, who concluded that age discrimination was a serious problem, but one *different in kind* from discrimination on account of race." *Id.* at 587 (citation omitted; emphasis added); *see* Rep. of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 2 (1965) (hereinafter Wirtz Report). Specifically, Labor Secretary W. Willard Wirtz observed that "[e]mployment discrimination because of race is identified ... with feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned." Wirtz Report at 2 (emphasis in original), *quoted in Gen. Dynamics*,

540 U.S. at 587 n.2. Instead, older workers face a different "kind of discrimination," one that "involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* (emphasis in original). Secretary Wirtz referred to these sorts of stereotype-based distinctions as "'arbitrary' discrimination." *Smith*, 544 U.S. at 232 (quoting Wirtz Report at 22). Secretary Wirtz's notion that Congress needed to address only "arbitrary" age discrimination—i.e., discrimination based upon ageist stereotypes—formed the foundation for the ADEA, whose "statements of purpose and findings ... mirror the Wirtz Report." *Gen. Dynamics*, 540 U.S. at 589.

In keeping with these origins and the stated congressional purpose, this Court has repeatedly observed that the ADEA targets only "*arbitrary* and stereotypical employment distinctions." *Id.* at 587 (emphasis added); *Thurston*, 469 U.S. at 120 ("'The ADEA 'broadly prohibits arbitrary discrimination ... based on age.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978))). As this Court has emphasized, the ADEA targets "inaccurate and stigmatizing stereotypes"—situations where an "employer ... rel[ies] on age as a proxy for an employee's remaining characteristics, such as productivity." *Hazen Paper*, 507 U.S. at 611. In short, the ADEA is directed at the sorts of arbitrary age discrimination in which an employer says or thinks, "Older employees are likely to be— ...." *Id.* at 612; *see generally Smith*, 544 U.S. at 254-56 (O'Connor, J., concurring) (cataloging the evidence that Congress targeted only "arbitrary discrimination"). Thus, when a differentiation

based upon age is not based on an inaccurate stereotype—and, therefore, is not arbitrary in the relevant sense, then it is not even accurate to call it "discriminat[ory]." *See Gilbert*, 429 U.S. at 145 ("When Congress makes it unlawful for an employer to 'discriminate ... because of ... sex ... ,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.").

B. The EEOC Cannot Establish that the Kentucky Statute Is Facially Discriminatory Without Demonstrating that It Is Arbitrary on Its Face.

The Court of Appeals ignored both the origins of the ADEA and the ways in which age discrimination is different from other sorts of discrimination when it concluded that the EEOC had no obligation to demonstrate that the Kentucky retirement statute was arbitrary—i.e., motivated by stereotype or animus. J.A. 77-81. The Court of Appeals' reasoning was as follows: "Once a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee 'because of' the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself." J.A. 78.

The flaw in this reasoning is that it incorrectly assumes that all age-related differences in treatment are per se "discriminatory," and that the very presence of an age differentiation in a policy, alone, is always "proof of discriminatory intent."

To be sure, the improper motive "'can *in some situations* be inferred from the mere fact of differences in treatment.'" *Hazen*, 507 U.S. at 609 (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) (emphasis added). Certainly, where the arbitrariness—the ageist stereotype—screams out from the face of the policy, it is perfectly appropriate to draw the inference without demanding further proof of improper motive. That was what this Court did in *Thurston*, where TWA had one rule for pilots who disqualified from flying because they were pushing 60 and another for pilots who were disqualified for any other reason, including sheer incompetence. 469 U.S. at 121; *see supra* at 25-26. There could be no question but that this rule, on its face, was arbitrary, in the sense in which the ADEA uses the word.

But as this Court seems to have acknowledged when it observed that courts may draw an inference of intent to discriminate "in some situations," *Hazen*, 507 U.S. at 609, the inference cannot be applied to every situation where a policy draws distinctions based on age. Where, for example, on the face of a plan, there is not the slightest hint of the sort of arbitrariness that motivated Congress to pass the ADEA, the plan cannot be struck as facially discriminatory; the EEOC must adduce some evidence that the differentiation is based on inaccurate stereotypes.

In this respect, the rules governing how and when it is permissible to draw such definitive inferences of discriminatory intent in an age discrimination case differ from the rules governing such inferences in cases involving explicit classification on the basis of race or gender. *See,*

e.g., *Johnson Controls*, 499 U.S. at 199 (no further evidence of arbitrariness or animus required once a differentiation based on gender appears on the face of a policy). It makes perfect sense to draw different inferences, for "age discrimination [is] a ... problem" that is "different in kind from discrimination on account of race." *Gen. Dynamics*, 540 U.S. at 587.

The differences do not disappear just because ADEA's substantive prohibition was cribbed from Title VII. *See Lorillard*, 434 U.S. at 584. There are times when it makes sense to "presume that Congress intended that text to have the same meaning in both statutes." *Smith*, 544 U.S. at 233 (plurality). But this Court has held that it is improper to import principles from Title VII to the ADEA when doing so would yield results that are inconsistent with the ADEA's origins and overarching purpose.

That is exactly what this Court did in *General Dynamics*, holding that the very same provision of the ADEA must be "read more narrowly than analogous provisions dealing with race or sex." *Gen. Dynamics*, 540 U.S. at 597-98. Specifically, when Title VII makes it impermissible for an employer to "discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), it allows for a "reverse discrimination" cause of action, for example, by a white employee or a male who claims to have been discriminated against on the basis of his "race" or "sex." *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (discrimination because of race is "not limited to discrimination against members of any

particular race"). Notwithstanding the identical language, when the ADEA makes it impermissible to "discriminate against any individual ... because of such individual's age," no such reverse-discrimination claim can be brought. *Gen. Dynamics*, 540 U.S. at 601. In distinguishing the ADEA from Title VII, this Court relied on the background recited above—the Wirtz Report's observations about the difference between age discrimination and other sorts of discrimination. *Id.* at 587-95. This Court concluded that it would undermine "the statute's manifest purpose" to read the ADEA the same as identical language in Title VII. *Id.* at 594.

The same background and the same principles should yield the same result here. Even though classifications on the basis of gender or race are routinely viewed as facially discriminatory without any further reflection about the underlying motive, that leap cannot be taken in the context of age discrimination unless the arbitrariness, and not just the differentiation, appears on the face of the policy.

C. The Kentucky Retirement Statute's Consideration of Age Is Not Arbitrary or Based on an Inaccurate Stereotype.

Kentucky's retirement statute is a rational accommodation for disabled employees who would not otherwise be eligible for retirement, and not an arbitrary stereotype of older employees. Kentucky's statute does not even arguably exhibit the sorts of evils Congress was targeting when it enacted the ADEA. Nothing in the structure or words of the statute—and nothing in the evidence presented—so much as hints at the sort of

"inaccurate and stigmatizing stereotypes" Congress wished to attack. *Hazen Paper*, 507 U.S. at 611. All indications are to the contrary.

First, as is demonstrated above, the eligibility for, and amount of, disability retirement benefits is organized around eligibility for retirement, not around age. *See supra* at 6-11, 21-24.

Second, it is perfectly legal to base retirement eligibility on age, and it is legal to base eligibility for disability benefits on whether an employee already has a retirement safety net. So it cannot be arbitrary—or discriminatory—to allow age to play a role in the determination of eligibility for disability benefits.

Third, the Kentucky retirement statute's correlation between eligibility for retirement and *in*eligibility for disability benefits is a ubiquitous feature of benefits law. Private insurers routinely adopt exactly that structure: The insurer sells a disability policy with a set term; coverage ends the moment the employee reaches eligibility for retirement.

Even Congress, itself, prescribed exactly that structure in the Social Security Act. The moment a worker becomes eligible for federal old-age benefits upon attaining age 62, the worker is no longer eligible for Social Security disability benefits. *See* 42 U.S.C. §§ 416(i)(2)(D), 423(a)(1)(B). It cannot be arbitrary or discriminatory when states or private entities adopt exactly the same structure that the federal government did for the single largest disability policy in the country. To hold that the ADEA so declares "would introduce unwelcome discord into

the federal statutes on employee benefit plans." *Gen. Dynamics*, 540 U.S. at 597 n.9 (noting "unwelcome discord" that the ADEA would introduce if it were to be interpreted to prohibit discrimination against the young).

Fourth, the precise sort of policy at issue in this case is ubiquitous. States and local governments across the country have routinely adopted policies where eligibility for age-based retirement and for disability benefits are complementary. They consider these policies to be the best way to attract and retain superior employees of all ages. When Congress enacted comprehensive pension legislation in the form of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, it excluded state and local governments from coverage based on federalism concerns. Congress assured states that they were free to design the nearly 2700 public employee retirement plans covering 23 million American workers. Nothing in the history or language of the ADEA suggests that Congress intended to wreak havoc with so many plans by tarring significant numbers of them as arbitrary or improperly motivated by impermissible stereotypes.

Fifth, for reasons described earlier, Kentucky's retirement statute is extraordinarily favorable to older workers. *See supra* at 5. If Kentucky were to eliminate the eligibility milestone that has created all the mischief in this case—the one allowing for retirement at age 55 with five years of service—older workers would be far worse off. A plan in which no one gets retirement benefits unless they work 20 years, or 30 years, is of little value to older workers. Older workers will shun an employer that

offers them so little by way of longer-term security—especially if the employer is trying to recruit them to hazardous jobs.

Therein lies the ultimate irony of this case. Chief Judge Boggs was correct when he observed that Kentucky finds itself sued precisely because it derived a retirement plan that was especially attractive to older workers. J.A. 97. The retirement statute's design enables an employee like Mr. Lickteig who moves into a public sector job later in life to achieve a guaranteed retirement benefit in only five years. If, as the Court of Appeals suggests, service alone is the only lawful measure of eligibility for disability policies that correlate with retirement policies, the result would be a policy that creates a barrier to employment for older workers in place of the current design which encourages and enables entry into the work force at any age with the ability to earn meaningful pension benefits. This would give rise to exactly the circumstances the ADEA was designed to prevent: policies that keep older workers from getting or keeping employment. So, as Chief Judge Boggs observed, Kentucky's "very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated [the] 'problem'" the EEOC set out to cure. *Id.* (citation omitted). In truth, the "problem" is the EEOC's theory, not Kentucky's generous retirement plan.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Nov. 5, 2007

APPENDIX

STATUTORY APPENDIX

29 U.S.C. § 621 provides:

Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623(a) provides:

Prohibition of age discrimination

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age.

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Relevant sections of the 1998 edition of the Kentucky Revised Statutes provide:

16.505 DEFINITIONS FOR KRS 16.510 TO 16.652

* * *

(15) "Normal retirement date" means the first day of the month following a member's fifty-fifth birthday, except that for members over age fifty-five (55) on July 1, 1958, it shall mean January 1, 1959. A member of the State Police Retirement System, a member of the County Employees Retirement System or a member of the Kentucky Employees Retirement System covered by this section with twenty (20) or more years of service credit, at least fifteen (15) of which are current may declare his "normal retirement date" to be some date prior to his fifty-fifth birthday; ....

16.545 CONTRIBUTIONS OF MEMBERS; PICKED-UP EMPLOYEE CONTRIBUTIONS

(1) Except for members over age fifty-five (55) on July 1, 1958, who shall not be required to contribute, each member shall, commencing on July 1, 1968, contribute for each pay period for which he receives compensation, seven percent (7%) of his creditable compensation.

(2) The employer shall cause to be deducted from the compensation of each member for each and every payroll period subsequent to July 1, 1958, the contributions payable by such member as provided in KRS 16.510 to 16.652

(3) Every member shall be deemed to consent to deductions made as provided herein; and the payment of salary or compensation less such deduction shall be a full and complete discharge of all claims for services rendered by such person during the period covered by such payment, except as to any benefits provided by KRS 16.510 to 16.652.

(4) Each employer shall, solely for the purpose of compliance with Section 414(h) of the United States Internal Revenue Code, pick up the employee contributions required by this section for all compensation earned after August 1, 1982, and the contributions so picked up shall be treated as employer contributions in determining tax treatment under the United States Internal Revenue Code and KRS 141.010(10). These contributions shall not be included as gross income of the employee until such time as the contributions are distributed or made available to

the employee. The picked-up employee contribution shall satisfy all obligations to the retirement system satisfied prior to August 1, 1982, by the employee contribution, and the picked-up employee contribution shall be in lieu of an employee contribution. Each employer shall pay these picked-up employee contributions from the same source of funds which is used to pay earnings to the employee. The employee shall have no option to receive the contributed amounts directly instead of having them paid by the employer to the system. Employee contributions picked up after August 1, 1982, shall be treated for all purposes of KRS 16.510 to 16.652 in the same manner and to the same extent as employee contributions made prior to August 1, 1982.

16.565 RETIREMENT ALLOWANCE ACCOUNT

The retirement allowance account shall be the account in which shall be accumulated all employer contributions, amounts transferred from the member contribution account, and to which all income from the investment assets of the system shall be credited. From this account there shall be paid administrative expenses and in addition all benefits payable under KRS 16.510 to 16.652. There shall be transferred from this account to the member contribution account the interest credited annually to each member's individual accounts.

16.576 NORMAL RETIREMENT

(1) Any member with at least five (5) years of service credit may retire at his normal retirement date, or subsequent thereto, upon written notification to the system, setting forth at what

time the retirement is to become effective, if the effective date shall be after his last day of service and subsequent to the filing of the notice at the retirement office.

(2) The member shall have the right to elect to have his retirement allowance payable under subsection (3), (4), or (6) of this section or any one (1) of the plans set forth in KRS 61.635.

(3) Effective August 1, 1990, a member of the Kentucky State Police Retirement System may elect to receive an annual retirement allowance, payable monthly during his lifetime, equal to two and five-tenths percent (2.5%) of final compensation for each year of service credit. Effective August 1, 1988, a member of the County Employees Retirement System covered by this section may elect to receive an annual retirement allowance, payable monthly during his lifetime, equal to two and five-tenths percent (2.5%) of final compensation for each year of service credit. Effective August 1, 1988, a member of the Kentucky Employees Retirement System covered by this section may elect to receive an annual retirement allowance, payable monthly during his lifetime, equal to two and forty-nine hundredths percent (2.49%) of final compensation for each year of service credit. The annual retirement allowance for a member covered by this section shall not exceed the maximum benefit as set forth in the Internal Revenue Code.

(4) The member may elect to receive a monthly retirement allowance payable for ten (10) years certain, actuarially equivalent to the retirement allowance payable under subsection (3) of this section. If the member should become deceased

prior to the expiration of ten (10) years, his beneficiary shall receive the remaining payments monthly for the duration of the ten (10) years. The provisions of KRS 61.702 notwithstanding, the member who retired on June 17, 1978, or thereafter, and his spouse and dependents or beneficiary shall continue to receive the insurance benefits to which they are entitled pursuant to KRS 61.702 after the expiration of ten (10) years. Effective with any insurance contract procured, or self-insurance plan instituted, after July 15, 1990, a member who retired prior to June 17, 1978, and his spouse and dependents or beneficiary shall receive insurance benefits pursuant to KRS 61.702 upon payment by the member or beneficiary of the entire cost of the required insurance premium.

(5) Notwithstanding any other provisions of this section, upon written notification to the system, a member shall have the option to defer his election to receive his retirement allowance. The retirement allowance payable under a deferred option shall be increased to reflect the deferred receipt of benefits.

(6) In lieu of any other benefits due under KRS 16.505 to 16.652, a member who has attained age fifty-five (55) and who has attained at least one (1) month of service credit but no more than fifty-nine (59) months of service credit may elect to receive an annual retirement allowance, payable monthly or less frequently as determined by the board, which shall be determined by multiplying his accumulated contributions by two (2) and converting this amount to an annual retirement allowance based on an annuity rate adopted by the board which would pay the actuarial equivalent of

twice his accumulated contributions over the lifetime of the retired member.

16.582 DISABILITY RETIREMENT

(1) (a) Total and permanent disability means a disability which results in the member's incapacity to engage in any occupation for remuneration or profit. Loss by severance of both hands at or above the wrists, or both feet at or above the ankles, or one (1) hand above the wrist and one (1) foot above the ankle, or the complete, irrevocable loss of the sight of both eyes shall be considered as total and permanent.

(b) Hazardous disability means a disability which results in the member's total incapacity to continue as a regular full-time officer or as an employee in a hazardous position, as defined in KRS 61.592, but which does not result in the member's total and permanent incapacity to engage in other occupations for remuneration or profit.

(c) In determining whether the disability meets the requirement of this section, any reasonable accommodation provided by the employer shall be considered.

(d) If the board determines that the total and permanent disability of a member receiving a retirement allowance under this section has ceased, then the board shall determine if the member has a hazardous disability.

(2) Any person may qualify to retire on disability, subject to the following:

(a) The person shall have sixty (60) months of service, twelve (12) of which shall be current

service credited under KRS 16.543(1), 61.543(1), or 78.615(1). The service requirement shall be waived if the disability is a total and permanent disability or a hazardous disability and is a direct result of an act in line of duty;

(b) The person shall be less than normal retirement age;

(c) The person's application shall be on file in the retirement office no later than twelve (12) months after the person's last day of paid employment as a regular full-time officer or in a regular full-time hazardous position;

(d) The person shall receive a satisfactory determination pursuant to KRS 61.665; and

* * *

(5) The disability retirement allowance shall be determined as provided in KRS 16.576, subject to the following:

(a) If the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday. The maximum service credit added shall not exceed the total service the member had on his last day of paid employment, and the maximum service credit for calculating his retirement allowance, including his total service and service added under this section, shall not exceed twenty (20) years;

(b) If the member's total service credit on his last day of paid employment is twenty (20) or more years, then his total service credit shall be

used.

(6) If the member receives a satisfactory determination of total and permanent disability or hazardous disability pursuant to KRS 61.665 and the disability is the direct result of an act in line of duty, the member's retirement allowance shall be calculated as follows:

(a) For the disabled member, benefits as provided in subsection (5) of this section except that the monthly retirement allowance payable shall not be less than twenty-five percent (25%) of the member's monthly final rate of pay; and

(b) For each dependent child of the member on his disability retirement date, who is alive at the time any particular payment is due, a monthly payment equal to ten percent (10%) of the disabled member's monthly final rate of pay; however, total maximum dependent children's benefit shall not exceed forty percent (40%) of the member's monthly final rate of pay. The payments shall be payable to each dependent child, or to a legally-appointed guardian, or as directed by the system.

(7) No benefit provided in this section shall be reduced as a result of any change in the extent of disability of any retired member who is age fifty-five (55) or older.

(8) If a regular full-time officer or hazardous position member has been approved for benefits under a hazardous disability, the board shall, upon request of the member, permit the member to receive the hazardous disability allowance while accruing benefits in a nonhazardous position, subject to proper medical review of the nonhazardous position's job description by the

system's medical examiner.

(9) For a member of the State Police Retirement System, in lieu of the allowance provided in subsection (5) or (6) of this section, the member may be retained on the regular payroll and receive the compensation authorized by KRS 16.165, if he is qualified.

61.592 RETIREMENT OF PERSONS WORKING IN HAZARDOUS POSITIONS

(1) "Hazardous position" means any position whose principal duties involve active law enforcement, including the positions of probation and parole officer and Commonwealth detective, active fire suppression or prevention, or other positions, including, but not limited to, pilots of the Transportation Cabinet and paramedics and emergency medical technicians, with duties that require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning. Hazardous positions shall include positions in the Department of Corrections in state correctional institutions and the Kentucky Correctional Psychiatric Center with duties that regularly and routinely require face-to-face contact with inmates.

(2) Each employer may request of the board hazardous duty coverage for those positions as defined in subsection (1) of this section, but a county, narrowly defined as one (1) of Kentucky's one hundred and twenty (120) counties, the provisions of KRS 78.510(3) notwithstanding, shall request hazardous duty coverage for its full-time paid firefighters. Upon request, each employer shall certify to the system, in the manner

prescribed by the board, the names of all employees working in a hazardous position as defined in subsection (1) of this section for which coverage is requested. The certification of the employer shall bear the approval of the agent or agency responsible for the budget of the department or county indicating that the required employer contributions have been provided for in the budget of the employing department or county. The system shall determine whether the employees whose names have been certified by the employer are working in positions meeting the definition of a hazardous position as provided by subsection (1) of this section.

(3) (a) An employee determined by the system to be working in a hazardous position in accordance with subsection (2) of this section shall contribute, for each pay period for which he receives compensation, seven percent (7%) of his creditable compensation;

(b) Each employer shall pay employer contributions based on the creditable compensation of the employees determined by the system to be working in a hazardous position at the employer contribution rate as determined by the board. The rate shall be determined by actuarial methods consistent with the provisions of KRS 61.565;

(c) If the employer participated in the system prior to electing hazardous duty coverage, the employer may pay to the system the cost in order that the nonhazardous service be credited as hazardous service, or the employer may establish a payment schedule for payment of the cost of the hazardous service above that which would be

funded within the existing employer contribution rate. The employer may extend the payment schedule to a maximum of thirty (30) years. Payments made by the employer under this subsection shall be deposited to the retirement allowance account of the proper retirement system and these funds shall not be considered accumulated contributions of the individual members. If the employer elects not to make the additional payment, the employee may make the lump-sum payment in his own behalf or may pay by increments. Payments made by the employee under this subsection shall not be picked up, as described in KRS 61.560(4), by the employer. If neither the employer nor employee makes the payment, the service prior to hazardous coverage shall remain nonhazardous.

(4) The normal retirement age, retirement allowance, other benefits, eligibility requirements, rights, and responsibilities of a member in a hazardous position, as prescribed by subsections (1), (2), and (3) of this section, and the responsibilities, rights, and requirements of his employer shall be as prescribed for a member and employer participating in the State Police Retirement System as provided for by KRS 16.510 to 16.652.

(5) Any person employed in a hazardous position after July 1, 1972, shall be required to undergo a thorough medical examination by a licensed physician, and a copy of the medical report of the physician shall be retained on file by the employee's department or county and made available to the system upon request.

(6) If doubt exists regarding the benefits

payable to a hazardous position employee under this section, the board shall determine the benefits payable under KRS 61.515 to 61.705, or 78.520 to 78.852, or 16.510 to 16.652.

78.545 MATTERS NOT SPECIFIED IN KRS 78.510 TO 78.852

The following matters shall be administered in the same manner subject to the same limitations and requirements as provided for the Kentucky Employees Retirement System as follows:

* * *

(40) Disability procedure for members in hazardous positions as provided for in KRS 16.582.

78.520 RETIREMENT SYSTEM CREATED; FUND ESTABLISHED

There is hereby created and established:

(1) A retirement system for employees to be known as the "County Employees Retirement System" by and in which name it shall, pursuant to the provisions of KRS 78.510 to 78.852, transact all of its business and shall have the powers and privileges of a corporation; and

(2) A state fund, called the "County Employees Retirement Fund," which shall consist of all the assets of the system as set forth in KRS 78.510 to 78.852.

Kentucky Revised Statutes § 16.577 (2000) provides:

16.577 EARLY RETIREMENT

Upon retirement at early retirement date, a

member may receive an annual retirement allowance payable monthly during his lifetime which shall be determined in the same manner as for retirement at his normal retirement date, with years of service and final compensation being determined as of the date of his actual retirement, but the amount of the retirement allowance so determined shall be reduced to reflect the earlier commencement of benefits.

Kentucky Revised Statutes § 16.577(2) (2001) provides:

There shall be no reduction in the retirement allowance of a member who has twenty (20) or more years of service credit, at least fifteen (15) of which are current service.